

CHART II--JURISDICTION; ANALYSIS OF MICHIGAN'S AUTHORITY OVER THE WATERS REGULATED BY 404

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

COE retains jurisdiction in waters subject to ebb and flow of tide, navigable waters, and waters which could be made navigable by reasonable improvement, for use in interstate or foreign commerce, and adjacent wetlands.

State programs regulate all waters in the state except those retained by the COE.

Guidance to State 404 Program Regulations p. 6

State regulated waters means those waters over which the Corps of Engineers relinquishes permitting authority to state's approved Section 404 permit program. These waters shall be identified in the Memorandum of Agreement between the state and the Secretary of the Army.

NOTE: The State of Michigan, of course, is vested with, retains and has no intention of relinquishing its authority over and responsibilities for the protection of the waters of this state, (be they navigable or nonnavigable; waters of the Great Lakes or of inland bodies of water), against pollution, impairment, destruction, from the activities of any person, party or entity.

Section 404(g)(1) requires that the Secretary retain jurisdiction over the following waters:

1. Waters subject to the ebb and flow of the tide;
2. Waters which may be used to transport interstate or foreign commerce shoreward to their ordinary high water mark; and
3. Wetlands adjacent to waters in 1 and 2.

Waters of the United States means:

1. The territorial seas with respect to the discharge of dredged or fill material;
2. Coastal and inland waters, lakes, rivers, and streams that are navigable waters including adjacent wetlands;
3. Tributaries to navigable waters including adjacent wetlands;
4. Interstate waters and their tributaries including adjacent wetlands; and

"Wetland" means land characterized by the presence of water at a frequency and duration sufficient to support and that under normal circumstances does support wetland vegetation or aquatic life and is commonly referred to as a bog, swamp, or marsh and which is any of the following:

(i) Contiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream.

(ii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and more than 5 acres in size; except this subdivision shall not be of effect, except for the purpose of inventorying, in counties of less than 100,000 population until the department certifies to the commission of natural resources it has substantially completed its inventory of wetlands in that county.

(iii) Not contiguous to the Great Lakes, an inland lake or pond, or a river or stream; and 5 acres or less in size if the department determines that protection of the area is essential to the preservation of the natural resources of the state from pollution, impairment, or destruction and the department has so notified the owner; except this subdivision may be utilized regardless of wetland size in a county in which subdivision (ii) is of no effect; except for the purpose of inventorying, at the same time.

MCLA 281.702

Wetlands Protection Act

The commission shall protect and conserve the water resources of the state and shall have control of the pollution of surface and underground waters of the state and the Great Lakes...

MCLA 323.2(1)

Water Resources

As indicated by the cited statutory authorities, case law, etc., the State of Michigan has comprehensive jurisdiction over waters of this state.

The Water Resources Commission Act governing discharge of pollutants into water of this state includes within its ambit all waters of the State of Michigan. It is, of course, clear that the Inland Lakes and Stream Act and the Wetlands Act exclude from their purview certain lakes having an area of less than 5 acres. Even this problem is, in fact, of no practical matter for a number of reasons. First, it is quite conceivable that a lake under 5 acres would have an affect on interstate commerce so as to imbue it with the distinction of being "water of the United States" and thus subject to the federal permit program.

Finally, MEPA and the Michigan Constitution Art. 4, Sec. 52, requires that no agency may perform an act, or license an action, which would result in unnecessary environmental damage. For a further discussion of this, see introduction.

There appears, therefore, to be no notable jurisdictional impediment to Michigan's assumption of the 404 program.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

5. All other waters of the United States not identified in paragraphs 1-4, which could affect interstate commerce. The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction of all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

EPA Guide to the Dredge or Fill Permit Programs p. 11

"Inland lake or stream" means a natural or artificial lake, pond or impoundment; a river, stream or creek which may or may not be serving as a drain as defined by Act No. 40 of the Public Acts of 1956, as amended, being sections 280.1 to 280.623 of the Compiled Laws of 1948; or any other body of water which has definite banks, a bed and visible evidence of a continued flow or continued occurrence of water, including the St. Mary's, St. Clair and Detroit rivers. It does not include the Great Lakes, Lake St. Clair and a lake or pond which has a surface area of less than 5 acres.

MCLA 281.952(f)

Inland Lakes & Streams

(The commission) shall take all appropriate steps to prevent any pollution which is deemed by the commission to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream or other waters of the state.

MCLA 323.5

Water Resources

CHART III--ANALYSIS OF MICHIGAN'S LEGAL AUTHORITY TO COMPLY WITH THE REQUIREMENTS OF SECTION 404(h)(1)

FEDERAL REQUIREMENT	STATE AUTHORITY	DISCUSSION
<p>The administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section.</p>		<p>Directions to administrator, no state authority necessary.</p>
<p>Whether such state has the following authority with respect to the issuance of permits pursuant to such program:</p>		
<p>(A) To issue permits.</p>	<p>...a riparian owner shall obtain a permit from the department...before dredging or placing spoil or other materials on bottom-land. 322.703(2) MCLA Great Lakes Submerged Lands Act Before a project which is subject to this act is undertaken, a person shall file an application and receive a permit from the department. 281.955 MCLA Inland Lakes & Streams Act</p> <p>Except as otherwise provided by this act or by a permit obtained from the department under sections 7 to 12, a person shall not: (a) Deposit or permit the placing of fill material in a wetland. 281.705 MCLA Wetland Protection Act</p>	<p>The cited state statutes quite amply demonstrate that Michigan presently possesses adequate legal authority to issue permits within the realm of Section 404. See charts I and II for a discussion of the state waters within the jurisdiction of Section 404 and the scope of the activities encompassed by that section.</p>
<p>which-- (i) apply, and assure compliance with, any applicable requirements of this section, including but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 307 and 403 of this act.</p>	<p>A permit...shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefit derived from the activity, and that the activity is otherwise lawful. *** In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the</p>	<p>As is apparent from the statutes cited, state agencies have comprehensive authority to condition and restrict permits so that they will be in full compliance with any applicable requirements of Section 404, or any other federal authority, for that matter.</p> <p>The guidelines enacted under Section 404(b)(1), found at 40 CFR 230, for example, are comprehensively embraced by existent Michigan law. Although these guidelines entail a great</p>

3.35

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

reasonably foreseeable detriment of the activity. The decision shall reflect the national and state concern for the protection of natural resources from pollution, impairment and destruction. (The provision goes on to list nine general criteria focusing on environmental impact.)
Wetlands Act, Section 9

(4) An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by an agency of the United States or by a nationally recognized organization or association.

The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if agency wishes to incorporate them in its rule it shall amend the rule or promulgate a new rule therefore.

MCLA 24.232

Michigan Administrative Procedures Act

Section 5. The commission shall establish such pollution standards for lakes, rivers, streams and other waters of the state in relation to the public use to which they are or may be put, as it shall deem necessary. It shall issue permits which will assure compliance with state standards to regulate municipal, industrial and commercial discharges or storage of any substance which may affect the quality of the waters of the state. It may set permit restrictions which will assure compliance with applicable federal law and regulations.

MCLA 323.5

Water Resources Commission

...The commission may take such steps as may be necessary to take advantage of any act of congress heretofore or hereafter enacted

number of very technical requirements, the core concern of them is plain: The discharge of dredged or fill material shall not be allowed unless such discharge is (1) absolutely necessary and (2) will not have an unacceptable adverse impact on the environment. Even a glance at the pertinent state statutes shows that this concept prevades Michigan law.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(ii) are for fixed terms not exceeding five years:

which may be of assistance in carrying out the purposes of this act..., and the federal water pollution control act, as amended.

MCLA 323.2a(1)

Water Resources Commission

"The department may establish a reasonable time when the construction, development or use is to be completed or terminated. A general permit shall not be valid for more than 5 years."

Wetlands Protection Act

Section 10(3)

"A permit is effective until revoked for cause but not beyond its term."

Inland Lakes & Streams Act

Section 8

...A permit may specify the term and conditions under which the work is to be carried out.

MCLA 281.958

Inland Lakes & Streams Act

A permit shall provide that the work specified therein shall be completed within a specified term, normally not more than 1 year from the date of issuance, or as otherwise determined by the department. An extension of time may be granted by the department.

R 281.813

Inland Lakes & Streams Rule

(iii) can be terminated or modified for cause, including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(2) A permit may be terminated or modified for cause, including:

(a) a violation of a condition of the permit;

(b) obtaining a permit by misrepresentation, or failure to fully disclose relevant facts;

(c) a change in a condition that requires a temporary or permanent change in the activity.

MCLA 281.711(2)

Wetland Protection Act

State authority clearly shows that the state is empowered to issue permits that are subject to a fixed term as required by the statute (this authority may also be gleaned from the stated power of the agencies to condition the issuance of permits). The 5 year period is also within the ambit of Michigan's authority. The Wetlands Act, for instance, limits general permits--which have, of course, the broadest scope of any permits, to a 5 year term; since the department may, under the state statute, establish a "reasonable" time limit on other permits, they would indubitably be limited to less than 5 years. Similarly, DNR rules note that the fixed term of inland lakes permits is "normally" less than 1 year. Thus, the authority of Michigan to limit permits to a fixed term of less than 5 years is quite clearly established.

This statutory requirement is adequately accounted for in existent Michigan law. The Wetlands Act, of course, precisely parallels the federal law. The only discrepancy in the remaining authority is that the Inland Lakes and Streams Act provides only for revocation of a permit. This omission is irrelevant, however, for essentially two reasons. First, the authority to modify a permit is clearly, a logically necessary by-product of the authority to revoke - modification is, after

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(B) To issue permits which apply and assure compliance with, all applicable requirements of section 308 of this act, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this act.

INSPECTIONS, MONITORING, AND ENTRY.

Sec. 308(a) Whenever required to carry out the objective of this act, including but not limited to (1) developing or assisting in the development, of effluent standard, pre-treatment standard, or standard of performance under this act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pre-treatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to state permit program), and 504 of this act--

(B) The administrator or his authorized representative, upon presentation of his credentials:

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which

A permit is effective until revoked for cause... A permit may be revoked after a hearing for violation of any of its provisions, any provision of this act, any rule promulgated under this act or any misrepresentation in application.

MCLA 281.958

Inland Lakes and Streams Act

The department shall require the holder of a permit to provide information the department reasonably requires to obtain compliance with this act.

MCLA 281.712(1)

Wetland Protection Act

...The application shall...include any information that may be required by the department.

MCLA 281.955(1)

Inland Lakes and Streams Act

...A permit may specify the term and conditions under which the work is to be carried out.

MCLA 281.958

Inland Lakes & Streams Act

Upon reasonable cause or obtaining a search warrant, the department may enter on, upon, or through the premises on which information required to be maintained...is located.

MCLA 281.712(2)

Wetland Protection Act

Sec. 4. The commission or any agent duly appointed by it shall have the right to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions

all, merely a partial revocation. So if an agency has the power to revoke a permit for cause, it certainly has the authority to modify it. The second and perhaps the most cogent reason that the inland lakes language provides ample authority involves a basic tenet of the 404 assumption process: States are perfectly free to enact provisions that are more stringent than the federal requirements (see 40 CFR 123.1(k)). This concept, of course, allows states to provide for the revocation of permits without enacting the less stringent measure of modification.

To begin with, this requirement of assuring compliance with Section 308 is fully covered by the aforementioned state authority to condition permits so that they fully comply with any applicable federal standards (see analysis of Section 404(h)(1)(A)(i)). Notwithstanding this comprehensive coverage, Michigan does have existent legal authority which amply complies with the mandate of Section 308. Although the inland lakes provision deals only with applications, the state's power to revoke effectively extends the information requirement throughout the duration of the project.

As is quite apparent from these state statutes, Michigan has broad authority to enter and investigate projects subject to Section 404. This section of Section 404, then, is well provided for.

CAVEAT: Any entry upon the lands or curtilage of another and any search conducted thereon is, of course, subject to constitutional restraints imposed by the United States Constitution and the Constitution of the State of Michigan.

FEDERAL REQUIREMENT

the owner or operator of such sources is required to sample under such clause.

(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable standards, and (2) shall be available to the public, except that upon a showing satisfactory to the administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to the other officers, employees, or authorized representatives of the United States concerned with carrying out this act or when relevant in any proceeding under this act.

STATE AUTHORITY

relating to the pollution of any waters and the obstruction of the floodways of the rivers and streams of this state. The commission shall have the right to call upon any officer, board, department, school, university, or other state institution and the officers or employees thereof for any assistance deemed necessary to the carrying out of this act.

MCLA 323.4
Water Resources Commission

Upon request, the department shall immediately provide any person a copy of a permit application and supporting documents, at cost of reproduction, if the documents are reproducible. If not reproducible, these documents may be examined at the department's office.

R 281.813(8)
Inland Lakes and Streams Rule

A writing prepared, owned, used, in the possession of, or retained by the board in the performance of any official function shall be made available to the public in compliance with (the Michigan Freedom of Information Act).

MCLA 323.2(3)
Water Resources

A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions.

MCLA 15.233(2)
Freedom of Information Act

DISCUSSION

(effluent data) Implied in the Department's authority to obtain information from applicants and permittees, is the authority to have that information related to a particular standard.

(availability of information) The quoted state authority fully complies with this Section 404 requirement and needs no further analysis.

- "Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created.

MCLA 15.232(c)
Freedom of Information Act

A state agency shall publish and make available to the public all of the following:

- (a) Final orders or decisions in contested cases and the records on which they were made.
- (b) Promulgated rules.
- (c) Other written statements which implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

MCLA 15.241(1)
Freedom of Information Act

A public body may exempt from disclosure as a public record under this act:

- (g) Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy if:

- (i) The information is submitted upon a promise of confidentiality by the public body.

- (ii) The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.

- (iii) A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request. This subdivision shall not apply to information submitted as required by law or as a condition of receiving a government contract, license, or other permit.

MCLA 15.243(1)
Freedom of Information Act

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(c) Each state may develop and submit to the administrator procedures under state law for inspection, monitoring, and entry with respect to point sources located in such state. If the administrator finds that the procedures and the law of any state relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such state is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such state (except with respect to point sources owned or operated by the United States).

(C) To assure that the public, and any other state the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application. -

This provision merely instructs the administrator; it is, therefore, unnecessary to show state authority.

A person who desires notification of pending permit applications may make a written request to the department...

The department shall prepare a biweekly list of the applications made during the previous two weeks and shall promptly mail copies of the list for the remainder of the calendar year to the persons who requested notice.

MCLA 281.708(3)

Wetland Protection Act

Within 60 days after receipt of the completed application and fee, the department may hold a hearing... The department may approve or disapprove a permit application without a public hearing unless a person requests a hearing in writing within 20 days after the mailing of notification of the permit application as required by subsection (3), or the department determines that the permit application is of significant impact to warrant a public hearing.

MCLA 281.708(1)

Wetland Protection Act

The department shall promulgate and enforce rules to implement this act.

Wetland Protection Act

Sec. 17(1)

These various state statutes dealing with public notice and opportunity for public hearings demonstrate the sufficiency of Michigan's present authority to comply with this particular federal statutory provision.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

A person who desires notification of pending applications may make a written request to the department...

The department shall prepare a monthly list of the applications made during the previous month and shall promptly mail copies of the list for the remainder of the calendar year to the persons who have so requested notice.

MCLA 281.956(1)

Inland Lakes and Streams Act

The commission shall organize and make its own rules and procedure...

MCLA 323.2

Water Resources

...The department may hold a public hearing on pending applications.

MCLA 291.956(1)

Inland Lakes and Streams Act

(2) Upon receiving an application, the department shall submit copies for review to the director of public health or local health department designated by him, the city, village or township and the county where the project is to be located, the local soil conservation district, the local watershed council organized under Act 253 of the Public Acts of 1964, if any, the local port commission, if any, and the persons required to be included in the application pursuant to subsection (1) of section 5, accompanied by a statement that unless a written request is filed with the department within 20 days after the submission for review, the department may grant the application without a public hearing where the project is located. The department shall hold a public hearing upon the written request of the applicant or a riparian owner or a person or governmental unit which is entitled to receive a copy of the application pursuant to this subsection.

MCLA 281.956(2)

Inland Lakes and Streams Act

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(D) To assure that the administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any state (other than the permitting state), whose waters may be affected by the issuance of a permit may submit written recommendation to the permitting state (and the administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting state, that the permitting state will notify such affected state (and the administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgement of the secretary, after consultation with the secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

The commission may promulgate and enforce rules to implement this act.

Inland Lakes and Streams
Sec. 11(1)

The water resources commission is designated the state agency to cooperate and negotiate with other governments, governmental units and agencies thereof in matters concerning the water resources of the state... The commission may take such steps as may be necessary to take advantage of any act of congress heretofore or hereinafter enacted which may be of assistance in carrying out the purposes of this act including...the federal water pollution control act, as amended.

MCLA 323.2a(1)
Water Resources

The commission shall organize and make its own rules and procedures...

MCLA 323.2(1)
Water Resources

The waters and lands lying under the water of the Great Lakes are impressed with the public trust and no act of the legislature nor of any agency of the state may authorize a substantial impairment of the public's interest in such land and water. Title to such land is held in trust for the people for the purpose of navigation, fishing, etc. (See Hilt v. Weber 252 Mich 198 (1930); Illinois CD Co. v. Illinois 146 US 387 (1892)).

Similarly, the right of the public to freely navigate the navigable or public inland waters of this state is guaranteed by the constitution and protected by the laws of the state. No substantial impairment of such rights may be permitted by commission act. (See Moore v. Sanborne 2 Mich 519 (1853); Attorney General v. Taggart 306 Mich 432 (1943)).

These two provisions, requiring that notice be given to the administrator and any affected states, fall squarely within the duties and authority of the Water Resources Commission, as is indicated by the cited state statute. Providing the notice called for in the federal statute certainly poses no problem in light of the existent state authority.

The cited Michigan statutory and case law amply demonstrate that the State of Michigan does indeed have legal authority to and the responsibility for assuring that the navigability of its waters is not impaired. With regard, however, to any requirement that the State of Michigan shall issue no permit if, in the judgment of the secretary of the department in which the coast guard is operating, anchorage and navigation of any navigable waters would be substantially impaired thereby; the State of Michigan may credit the opinions of that secretary, but neither the State of Michigan nor any of its agencies may defer to or delegate any of their responsibilities to the federal secretary, it being their responsibility; i.e., the

The legislative power of this state is vested in the legislature and in the people ... The legislature is prohibited by the constitution from delegating legislative power to non-Michigan governmental agencies. (Minor Walton Bean Company v. Unemployment Compensation Commission 308 Mich 636, 654, 666; Colony Town Club v. Unemployment Compensation Commission 301 Mich 107, 113, 114). Coffman v. State Board of Examiners (1951) 331 Mich 582, 587 quoting with approval OAG 1951, 1 February 51.

state agency's and state officer's responsibilities to themselves decide whether any activity for which a permit is applied for would substantially impair navigable waters, if carried to fruition.

Michigan cases establish that final decision-making discretion must remain in the hands of those state agencies to which such discretion is afforded. Although they can validly adopt by reference any federal criteria already in existence, they cannot validly delegate either the decision-making power or bind themselves to future criteria which is not presently in existence.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

Sec. 3. The commission shall be authorized to bring any appropriate action in the name of the people of the state of Michigan, either at law or in chancery as may be necessary to carry out the provisions of this act, and to enforce any and all laws relating to the pollution of the waters and the obstruction of the floodways of the rivers and streams of this state. Whenever the attorney general deems it necessary, he shall take charge of and prosecute all criminal cases arising under the provisions of this act.

MCLA 323.3

Water Resources

Sec. 10(2) A person who discharges a substance into the waters of the state contrary to the provisions of a permit, order, rule, or stipulation of the commission, or who makes a false statement, representation, or certification in an application for, or form pertaining to a permit, or in a notice of report required by the terms and conditions of an issued permit, or who renders inaccurate a monitoring device or record required to be maintained by the commission, is guilty of a misdemeanor and shall be fined not less than \$2,500.00 nor more than \$25,000.00 for each day during which the unlawful discharge occurred. If the conviction is for a violation committed after a first conviction of the person under this subsection, the court may impose a fine of not more than \$50,000.00

The vast array of Michigan statutory authority quoted plainly shows that this state complies fully with this particular requirement of Section 404, in both the civil and criminal realms.

per day of violation. The circuit court for the county in which the violation occurred has exclusive jurisdiction. However, the person shall not be subject to the penalties of this subsection if the discharge of the effluent is in conformance with and obedient to a rule, order, or permit of the commission. In addition to a fine, the attorney general may file a suit in a court of competent jurisdiction to recover the full value of the injuries done to the natural resources of the state and the costs of surveillance and enforcement by the state resulting from the violation. In addition to a fine, the court in its discretion may impose probation upon a person for a violation of this act.

MCLA 323.10

Water Resources

Sec. 13(1) The department may commence a civil action in the circuit court of the county in which a violation occurs to enforce compliance with this act, to restrain violation of this act or any action contrary to an order of the department denying a permit, to enjoin the further performance of, or order the removal of, any project which is undertaken contrary to this act or after denial of a permit by the department, or to order the restoration of the affected area to its prior condition.

(2) In a civil action commenced under this act the circuit court, in addition to any other relief granted, may assess a civil fine of not more than \$5,000.00 per day for each day of violation.

(3) Except as provided in subsection (4), a person who violates this act, or a permit condition, is guilty of a misdemeanor, punishable by a fine of not more than \$10,000.00 per day for each day of violation.

(4) A person who knowingly makes a false statement, representation, or certification in an application for a permit, in a notice or report required by a permit; or a person who knowingly renders inaccurate any

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

monitoring device or method required to be maintained by a permit is guilty of a misdemeanor, punishable by a fine of not more than \$10,000.00 per day for each day of violation.

(5) Any civil penalty assessed, sought or agreed to by the department shall be appropriate to the violation.

MCLA 281.963, as amended

Inland Lakes and Streams Act

Section 13(1) If, on the basis of information available to the department, the department finds that a person is in violation of this act or a condition set forth in a permit issued under section 9 or 10, the department shall issue an order requiring the person to comply with the prohibitions or conditions or the department shall request the attorney general to bring a civil action under section 14(1)

MCLA 281.713(1)

Wetland Protection Act

Section 14(1) The attorney general may commence a civil action for appropriate relief, including injunctive relief upon request of the department under section 13(1)... The court has jurisdiction to restrain the violation and to require compliance with this act. In addition to any other relief granted under this section, the court may impose a civil fine of not more than \$10,000 per day of violation. A person who violates an order of the court shall be subject to a civil fine not to exceed \$10,000 for each day of violation.

(2) A person who violates this act is guilty of a misdemeanor, punishable by a fine of not more than \$2,500.00.

(3) A person who wilfully or recklessly violates a condition or limitation in a permit issued by the department under this act, or a corporate officer who has knowledge of or is responsible for a violation, is guilty of a misdemeanor, punishable by a

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

fine of not less than \$2,500.00 nor more than \$25,000.00 per day of violation, or by imprisonment for not more than 1 year, or both. A person who violated this section a second or subsequent time is guilty of a felony, punishable by a fine of not more than \$50,000.00 for each day of violation, or by imprisonment for not more than 2 years, or both.

(4) In addition to the penalties provided under subsections (1), (2) and (3), the court may order a person who violates this act to restore as nearly as possible the wetland which was affected by the violation, to its original condition immediately before the violation. The restoration may include the removal of fill material deposited in the wetland or the replacement of soil, sand, or minerals.

MCLA 281.714

Wetland Protection Act

(H) To assure continued coordination with federal and federal-state water-related planning and review processes.

Sec. 2a(1) The water resources commission is designated the state agency to cooperate and negotiate with other governments, governmental units and agencies thereof, in matters concerning the water resources of the state, including but not limited to flood control, beach erosion control and water quality control planning, development and management.

MCLA 323.2a(1)

Water Resources

The commission may make or cause to be made surveys, studies and investigations of the uses of waters of the state, both surface and underground, and cooperate with other governments, and governmental units and agencies...in making the surveys, studies and investigations.

MCLA 333.3(1)

The broad powers that were statutorily allotted to Michigan's Water Resources Commission are more than sufficient in satisfying the United States Congress' concern for continual water planning as expressed in this provision.

CHART IV--ANALYSIS OF MICHIGAN'S LEGAL AUTHORITY TO COMPLY WITH THE EPA'S CONSOLIDATED PERMIT REGULATIONS

FEDERAL REQUIREMENT	STATE AUTHORITY	DISCUSSION
<p>40 CFR 123.7(a)(1) 40 CFR 122.4</p> <p>(a) Permit application. Any person who is required to have a permit (including new applicants and permittees with expiring permits) shall complete, sign and submit an application to the director as described in this section and in...section 123.94</p> <p>404 dischargers covered by general permits under section 122.59 or 123.97, respectively, need not apply. Procedures for applications, issuance and administration of emergency permits are found exclusively in...section 123.96</p> <p>(b) Who applies? When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.</p> <p>(c) Completeness. The director shall not issue a permit under a program before receiving a complete application for a permit under that program except for...404 general permits..., or emergency permits. An application for a permit under a program is complete when the director receives an application form and any supplemental information which are completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity.</p>	<p>"...to obtain a permit for a (restricted) use or development, the person desiring the permit shall file an application with the department (of natural resources)." Wetland Protection Act Section 7(1)</p> <p>"Before a project which is subject to this act is undertaken, a person shall file an application and receive a permit from the department (of natural resources)." Inland Lakes and Streams Act Section 5(1)</p> <p>"Except as otherwise provided by this act or by a permit obtained from the department ..., a person shall not (perform the activities listed in the section)." Wetland Protection Act Section 5</p> <p>"Except as provided in this act, a person without a permit from the department shall not (perform the activities listed in the section)." Inland Lakes and Streams Act Section 3</p> <p>"...the department shall approve or disapprove the permit application (or hold a hearing on it)...after the completed permit application is filed with the department." Wetland Protection Act Section 8(1), (2)</p> <p>"...to obtain a permit for a (restricted) use or development, the person...shall file an application". Wetland Protection Act Section 7(1)</p>	<p>The Section 123 requirements referred to in this regulation are examined below. These two state statutory provisions amply satisfy the requirement that an application be filed.</p> <p>These state provisions comply with the federal regulation by requiring the doer of an activity to be responsible for obtaining the proper permits.</p> <p>The requirement of having a "complete" application is met by these state provisions. The completeness of the application is in the discretion of the director and thus poses no problem.</p>

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

"Before a project...is undertaken, a person shall file an application and receive a permit from the department. The application...shall include any information that may be required by the department."

Inland Lakes and Streams Act
Section 5(1)

"The department shall grant or deny the permit...after the filing of an application pursuant to section 5."

Inland Lakes and Streams Act
Section 6(5)

40 CFR 123.7(a)(1)
(40 CFR 122.4)

(e) Recordkeeping. Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted under section 123.94 for a period of at least 3 years from the date the application is signed.

The department shall require the holder of a permit to provide information the department reasonably requires to obtain compliance with this act.

MCLA 281.712(1)
Wetland Protection Act

...The application shall...include any information that may be required by the department.

MCLA 281.955(1)
Inland Lakes and Streams Act

...A permit may specify the term and conditions under which the work is to be carried out.

MCLA 281.958
Inland Lakes and Streams Act

Although Michigan law does not presently specify the 3 year retention period, such a requirement is certainly within the power granted to the DNR. Since the Inland Lakes and Streams Act allows the department to require any information prior to granting a permit (Section 5(1)), it implicitly has authority to require such information during the period of the permit's validity. This conclusion is easily drawn from reading the provision granting the information gathering power in conjunction with the clause which grants the department the power to revoke permits discussed below. The Wetlands Act, of course, specifically reserves the right of the department to continually request and receive information.

40 CFR 123.7(a)(2)
(40 CFR 122.6)

Applications. All permit applications... shall be signed as follows:

(1) for a corporation: by a principal executive officer of at least the level of vice-president;

(2) for a partnership or sole partnership: by a general partner or the proprietor, respectively; or

(3) for a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official.

Before a project which is subject to this act is undertaken, a person shall file an application and receive a permit from the department. The application...shall include any information that may be required by the department.

Inland Lakes and Streams Act
Section 5(1)

The department shall require the holder of a permit to provide information the department

Although there is no specific comprehensive Michigan authority calling for the signatures and certification statement required by this regulation, such minor procedures are easily authorized by the aforementioned authority of the DNR to require any information in an application for a permit. An enlightening example of just such a practice is found in the rules of the Water Resources Commission (WRC)--specifically, Rule 323.1313--which requires that the application for a permit to disturb

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(b) Reports. All reports required by permits (and) other information requested by the director...shall be signed by a person described in paragraph (a) of this section, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(1) the authorization is made in writing by a person described in paragraph (a) of this section;

(2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility. (A duly authorized representative may thus be either a named individual or any individual occupying a named position); and

(3) The written authorization is submitted to the director.

(c) Changes to authorization. If an authorization under paragraph (b) of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (b) of this section must be submitted to the director prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) Certification. Any person signing a document under paragraphs (a) or (b) of this section shall make the following certification: "I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment."

reasonably requires to obtain compliance with this act.

Wetland Protection Act
Section 12(1)

"Application to the department for a permit to occupy, fill, or grade lands in a flood plain, stream bed, or channel of a stream shall be...signed by the person proposing the development of activity or his authorized representative."

Water Resources Commission Rule
323.1313

a flood plain shall be signed. There would plainly be no problem whatsoever in likewise requiring such amenities in obtaining permits for activities covered by 404 permits. The entirety of this regulation, then, is easily coverable under existent Michigan legal authority.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 123.7(a)(3)
(40 CFR 122.7)

All conditions...shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit. (A list of required conditions follows.)

"The department may impose conditions on a permit for a use or development..."

Wetland Protection Act
Section 10(2)

"The (water resources) commission...may set permit restrictions which will assure compliance with applicable federal law and regulations...(and it) may make rules and orders restricting the polluting content of any waste material or polluting substance discharged or sought to be discharged into any...waters of the state."

Water Resources Act
Section 5

"A permit may specify the term and conditions under which the work is to be carried out."

Inland Lakes and Streams Act
Section 8

There is quite an abundance of legal authority allowing state agencies to impose conditions on permits they issue. Indeed, the existence of conditions is a logical necessity inherent in the permitting power; that is, since the state agencies have the power to totally deny a permit request at its discretion, it surely is able to grant the request on a conditional basis.

The legal authority cited demonstrates the unwavering power of the DNR to impose conditions on permits issued.

This conditioning power, in fact, wholly disposes with the need to delve into the specific conditions mentioned in the regulations--the present analysis is, after all, limited to the question of the state's authority to implement these regulations which, again, inarguably exists. Nevertheless, each particular condition outlined in 40 CFR 122.7 will also be examined individually below.

Again, although this federal requisite is inherent in the concept of permitting, Michigan has ample existent legal authority to meet it. This authority to terminate permits for non-compliance, coupled with the aforementioned authority to impose conditions on permits, adequately embraces a number of the specific conditions that are mandated by some of the federal regulations that follow.

These statutory provisions demonstrate that the state presently has the authority to limit permits to a fixed term and to require a re-application upon expiration of the permit term.

(a) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the appropriate act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

"A permit may be terminated or modified for...(a) violation of a condition of the permit."

Wetland Protection Act
Section 11(2)(a)

"A permit may be revoked...for violation of any of its provisions, any provision of this act, any rule promulgated under this act or any misrepresentation in application."

Inland Lakes and Streams Act
Section 8

(b) Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

"The department may establish a reasonable time when the construction, development, or use is to be completed or terminated. A general permit shall not be valid for more than 5 years."

Wetland Protection Act
Section 10(3)

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(c) Duty to halt or reduce activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(d) Duty to mitigate. The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

(e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of

"A permit is effective until revoked for cause but not beyond its term and may be subject to renewal."

Inland Lakes and Streams Act
Section 8

"The department may impose conditions on a permit...to mitigate the impact of a discharge."

Wetland Protection Act
Section 10(2)

It shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety or welfare; or which is or may become injurious to domestic, commercial, industrial, agricultural, recreational, or other uses which are being or may be made of such waters; or which is or may become injurious to the value or utility of riparian lands; or which is or may become injurious to livestock, wild animals, birds, fish, aquatic life, or plants or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired.

Water Resources Act
Section 6(a)

"A permit shall specify that a project... shall not cause unlawful pollution as defined by (the Water Resources Act)."

Inland Lakes and Streams Act
Section 7

Inasmuch as Michigan does not presently recognize such a defense to noncompliance, this requirement poses no difficulty.

This rather self-defeating condition is certainly covered by existent Michigan legal authority; the Wetland Protection Act allows the state to impose such conditions on a permit and the Inland Lakes and Streams Act dictates that every permit shall contain a provision that is tantamount to the federal requirement.

Again, this requisite may very easily be included as a permit condition under the aforementioned authority allowing the state to

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

(f) Permit actions. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit conditions.

(g) Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

(h) Duty to provide information. The permittee shall furnish to the director, within a reasonable time, any information which the director may request to determine whether cause exists for modifying, revoking, and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the director, upon request, copies of records required to be kept by this permit.

"This act shall not be construed to abrogate rights or authority otherwise provided by law."

Wetland Protection Act
Section 21(1)

"This act shall not deprive a riparian owner of rights associated with his ownership of water frontage."

Inland Lakes and Streams Act
Section 12

"The department shall require the holder of a permit to provide information the department reasonably requires to obtain compliance with this act."

Wetland Protection Act
Section 12(1)

"The (permit) application...shall include any information that may be required by the department."

Inland Lakes and Streams Act
Section 5(1)

impose conditions on its permits. It also may be noted that this requirement seems to be primarily directed at the other types of permits covered by these regulations and would infrequently, if ever, apply to 404 discharges.

This condition could, like the preceeding conditions, be made part of any 404 permit issued by the state. The substantive facet of this condition, i.e. that permits may also be modified, etc., for cause, is also amply provided for and is more fully discussed below:

This condition is easily includable under existent Michigan authority. Moreover, Michigan has never treated permit grants as the conveyance of a property right or exclusive privilege.

Like the rest, this condition may properly be required by the state under present Michigan authority. Further, there is existent statutory authority mandating the furnishing of information to the state; the Wetland Protection Act is quite to the point and the Inland Lakes and Streams Act impliedly so provides by reading the cited clause in conjunction with the state's power to revoke or otherwise alter the permit (Section 8). That is, since the state can revoke a permit and then require any information to reapply, their access to

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(1) Inspection and entry. The permittee shall allow the director, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

(1) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

(2) Have access to and copy at reasonable times, any records that must be kept under the conditions of this permit;

(3) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

(4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the appropriate act, any substances or parameters at any location.

(j) Monitoring and records.

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

"Upon reasonable cause or obtaining a search warrant, the department may enter on, upon, or through the premises on which an activity listed in section 5 (of this act) is located or on which information required to be maintained under subsection (1) (of section 12 of this act) is located."

Wetland Protection Act
Section 12(2)

"The (Water Resources) commission or any agent duly appointed by it shall have the right to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any waters or the obstruction of the floodways of the rivers and streams of this state."

Water Resources Act
Section 4

any information from the applicant, is in fact, ongoing and continuous.

As is readily apparent from the text of the cited statutes, Michigan has precedent supporting the condition called for by this regulation. Of course, as has been pointed out above, the state is presently free to place any such condition on the issuance of a permit.

We again caution that the lands and persons of others shall, under provisions of United States Constitution and the Constitution of the State of Michigan, remain free from unreasonable searches and seizures, and accordingly any statutory grants of authority to search or seize the persons or properties of others are subject to constitutional constraints.

This is another regulation which seems to have been designed primarily for the non-404 permit programs. They are of a much more continual nature and would thus be more likely to involve the monitoring and records at issue in this regulation. Nevertheless, should such procedures ever appear necessary in the context of a 404 permit, the state presently as has been noted above --can require the inclusion of any monitoring or reporting requirement as a condition of a permit.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

- (ii) The individual(s) who performed the sampling or measurements;
(iii) The date(s) analyses were performed;
(iv) The individual(s) who performed the analysis;
(v) The analytical techniques or methods used; and
(vi) The results of such analyses.

(k) Signatory requirements. All applications, reports, or information submitted to the director shall be signed and certified. (See Section 122.6.)

(1) Reporting requirements.

(1) Planned changes. The permittee shall give notice to the director as soon as possible of any planned physical alterations or additions to the permitted facility.

(2) Anticipated noncompliance. The permittee shall give advance notice to the director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

(3) Transfers. This permit is not transferable to any person except after notice to the director. The director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the appropriate act. (See Section 122.14; in some cases, modification or revocation and reissuance is mandatory.)

(4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit.

(5) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each scheduled date.

(6) Twenty-four hour reporting. The permittee shall report any noncompliance which may endanger health or the environment. Any

This condition may also be required by the state under existent authority. Also, see analysis of 40 CFR 122.6.

As has consistently and unwaveringly been the case with all of the aforementioned requirements of 40 CFR 122.7, these reporting requirements could, under present Michigan authority, be required as a condition on any 404 permit. Moreover, this rather drawn out section is but an elaboration on the kind of information the applicant is under a duty to supply under 40 CFR 122.7(h). (See analysis of 40 CFR 122.7(h).)

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue, and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance.

(7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (1), (4), (5), and (6) of this section, at the time monitoring reports are submitted. The reports shall contain the information listed in paragraphs (1), (6) of this section.

(8) Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the director, it shall promptly submit such facts or information.

40 CFR 123.7(a)(4)

(40 CFR 122.8)

(a) All programs. In addition to conditions required in all permits for all programs (section 122.7), the director shall establish conditions, as required on a case-by-case basis, in permits for all programs under sections 122.9 (duration of permit), 122.10(a) (schedules of compliance), and 122.11 (monitoring).

(5)(1) In addition to conditions required by section 122.97, the director shall establish conditions in permits for the individual programs, as required on a case-by-case basis, to provide for and assure

"If...the department finds that a person is in violation of this act or a condition set forth in a permit issued..., the department shall issue an order requiring the person to comply with the prohibitions or conditions

These requirements are examined separately below.

As has been repeatedly pointed out, the state of Michigan presently has ample legal authority to impose conditions on any permit issued; the conditions called for in this regulation, then, can easily be provided for. As

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

compliance with all applicable requirements of the appropriate act and regulations.

(2) For a state issued permit, an applicable requirement is a state statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit.

...an applicable requirement is also any requirement which takes effect prior to the modification or revocation and reissuance of a permit to the extent allowed in section 122.13.

(3) New or reissued permits, and to the extent allowed under section 122.15 modified or revoked and reissued permits, shall incorporate each of the applicable requirements in...section 123.98.

(c) Incorporation. All permit conditions shall be incorporated either expressly or by reference. If incorporated by reference, a specific citation to the applicable regulations or requirements must be given in the permit.

40 CFR 123.7(a)(5)
(40 CFR 122.9)

(a) ...permits shall be effective for a fixed term not to exceed 5 years.

(d) Except as provided in section 122.5, the term of a permit shall not be extended by modification beyond the maximum duration specified in this section.

(e) The director may issue any permit for a duration that is less than the full allowable term under this section.

or the department shall request the attorney general to bring a civil action under (the appropriate section of this act)."

Wetland Protection Act
Section 13(1)

"The department may commence a civil action ...to enforce compliance with this act."

Inland Lakes and Streams Act
Section 13(1)

further support for the existence of such a procedure, the cited statutes exemplify the concern for assuring compliance with the applicable statutes. Section 123.98 is dealt with below.

This procedural requirement poses no problem in light of present Michigan authority regarding the imposition of permit conditions.

"The department may establish a reasonable time when the construction, development, or use is to be completed or terminated. A general permit shall not be valid for more than 5 years."

Wetland Protection Act
Section 10(3)

"A permit is effective until revoked for cause but not beyond its term and may be subject to renewal."

Inland Lakes and Streams Act
Section 8

"A permit shall provide that the work specified therein shall be completed within a specified term, normally not more than 1

The cited state authority quite clearly demonstrates that the department is empowered to issue permits that are subject to a fixed term as required by this regulation (this authority could also be gleaned from the aforementioned power of state agencies to condition the issuance of permits). The 5 year period is also within the ambit of Michigan's authority. The Wetland Protection Act, for instance, limits general permits - which have, of course, the broadest scope of any permits - to a 5 year term, since the department may under the statute, establish a "reasonable" time limit on other permits, they would obviously be limited to less than 5 years. Similarly, the Inland Lakes and Streams Act very definitely provides for permits with a fixed term - determinable by

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

year from the date of issuance, or as otherwise determined by the department."
DNR Rule R 281.813(1)

the department - which is "normally" to be 1 year or less. Thus, the authority of Michigan to limit permits to a fixed term of less than 5 years is clearly established.

40 CFR 123.7(a)(6)
(40 CFR 122.10(a))

The permit may, when appropriate, specify a schedule of compliance leading to compliance with the appropriate act, and regulations.

(1) Time for compliance. Any schedules of compliance under this section shall require compliance as soon as possible.

(3) Interim dates. Except as provided in paragraph (b)(1)(ii) of this section, if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

(i) The time between interim dates shall not exceed 1 year.

(ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(4) Reporting. The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the director in writing of its compliance or non-compliance with the interim or final requirements, or submit progress reports if paragraph (a)(1)(ii) of this section is applicable.

This discretionary regulation requires no substantial analysis of state legal authority. There is certainly nothing in Michigan law that prevents the establishment of schedules of compliance; this regulation in large part provides guidance as to the procedure of maintaining such schedules. Also, the state may require such schedules as part of its aforementioned power to impose permit conditions.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 123.7(a)(f)
(40 CFR 122.11)

All permits shall specify:

(a) Requirements concerning the proper use, maintenance, and installation when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including when appropriate, continuous monitoring;

(c) Applicable reporting requirements based upon the impact of the regulated activity, and as specified if applicable, 40 CFR Part 320. Reporting shall be no less frequent than specified in the above regulations.

40 CFR 123.7(a)(8)
(40 CFR 122.13)

(a) ...compliance with a permit during its term constitutes compliance, for purposes of enforcement, with...sections 301, 307, and 403 of CWA... However, a permit may be modified, revoked and reissued, or terminated during its term for cause as set forth in sections 122.15 and 122.16.

(b) The issuance of a permit does not convey any property rights of any sort or any exclusive privilege.

"This act shall not be construed to abrogate rights or authority otherwise provided by law."

Wetland Protection Act
Section 21(1)

"This act shall not deprive a riparian owner of rights associated with his ownership of water frontage."

Inland Lakes and Streams Act
Section 12

40 CFR 123.7(a)(9)
(40 CFR 122.14)

(a) ...a permit may be transferred by the permittee to a new owner or operator only if

"...to obtain a permit...the person desiring the permit shall file an application... (which) shall include:

Again, as drawn from the state's established power to impose permit conditions, Michigan quite clearly has the legal authority to fully comply with this regulation. This section, though, is of an operational nature, rather than one involving any questions of the state's legal authority.

Subsection (a) of this regulation is more of a statement of federal policy rather than a substantive rule requiring an analysis of state legal authority. The revocation of permits is dealt with in subsequent sections of this analysis.

Subsection (b) also poses no problem. As indicated by the cited state authority, the state of Michigan has never treated the issuance as the bestowal of special rights or privileges.

This regulation is met implicitly through a logical reading of the denoted Michigan authority. That is, although Michigan law

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

the permit has been modified or revoked and reissued (under section 122.15(b)(2)), or a minor modification made (under section 122.17(d)), to identify the new permittee and incorporate such other requirements as may be necessary under the appropriate act.

40 CFR 123.7(a)(10)
(40 CFR 122.15)

When the director receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see 40 CFR 122.7), receives a request for modification or revocation and reissuance under 40 CFR 124.5, or conducts a review of the permit file), he or she may determine whether or not one or more of the causes listed in paragraphs (a) and (b) of this section for modification or revocation and reissuance or both exist. If cause exists, the director may modify or revoke and reissue the permit accordingly, subject to the limitations of paragraph (c) of this section, and may request an updated application if necessary. When a permit is modified, only the conditions subject to modification are reopened. If a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term. See 40 CFR 124.5(c)(2). If cause does not exist under this section of 40 CFR 122.17, the director shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in 40 CFR 122.17 for "minor modifications" the permit may be modified without a draft permit or public review. Otherwise, a draft permit must be prepared and other procedures in 40 CFR 124 (or procedures of an approved state program) followed.

(a) The person's name and address.
(e) The wetland owner's name and address."
Wetland Protection Act
Section 7(1)

"Before a project...is undertaken, a person shall file an application and receive a permit."

Inland Lakes and Streams Act
Section 5(1)

"A permit may be terminated or modified for cause..."
Wetland Protection Act
Section 11(2)

"The department shall promulgate and enforce rules to implement this act."
Wetland Protection Act
Section 17(1)

"A permit may be revoked after a hearing for violation of any of its provisions, any provision of this act, any rule promulgated under this act or any misrepresentation in application."
Inland Lakes and Streams Act
Section 8

"The commission may promulgate and enforce rules to implement this act".
Inland Lakes and Streams Act
Section 11(1)

does not explicitly state that a transferee must be identified, to deny that such a procedure is required would totally subvert the provisions requiring the identification of applicants at all, allowing the unrestrained use of "straw men" to covertly procure permits for the true owners.

This regulation seems to distinguish the modification of an issued permit which just involved the re-examining of the part or clause being changed from the revocation and reissuance of a permit--which would be, in essence, a de novo review of the project as a whole. Although state law does not, except as to wetlands, presently allow for exactly such a procedure, it is quite clear that since, under the noted state authority, the state may totally revoke a permit, it stands to reason that the state may exert its power only as to a particular clause of the permit. Thus, the authority of the state to comply with this regulation is well established.

It appears, however, that the establishment of such a modification procedure is, in fact, wholly unnecessary for essentially two reasons. First, as was already mentioned, the power to revoke a permit can quite logically be seen as the power to partially revoke, or modify, the same. The second, and perhaps more cogent, reason involves an underlying concept of the consolidated permit regulations: The states are left perfectly free to enact provisions that are more stringent than the federal requirements (see 40 CFR 123.1(k)). An application of this notion, of course, enables a state to have rules allowing the revocation of permits without providing for the less stringent measure of modification. This entire process is analyzed in more detail in the section below.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(a) Causes for modification. The following are causes for modification but not revocation and reissuance of permits.

"A general permit may be revoked or modified if...the department determines that the activities authorized by the general permit have an adverse impact on the environment or the activities would be more appropriately authorized by an individual permit."

"A permit may be terminated or modified for cause, including:

(a) A violation of a condition of the permit.

(b) Obtaining a permit by misrepresentation or failure to fully disclose relevant facts.

(c) A change in a condition that requires a temporary or permanent change in the activity."

Wetland Protection Act
Section 11

"A permit is effective until revoked for cause... A permit may be revoked...for violation of any of its provisions, any provision of this act, any rule promulgated under this act or any misrepresentation in application."

Inland Lakes and Streams Act
Section 8

"(The Water Resources Commission) shall issue permits which will assure compliance with state standards to regulate municipal, industrial and commercial discharges or storage of any substance which may affect the quality of the waters of the state. It may set permit restrictions which will assure compliance with applicable federal law and regulations."

Water Resources Act
Section 5

(1) Alterations. There are material and substantial alterations or additions to permitted facility or activity which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

"'Project' means an activity which requires a permit pursuant to section 3."

Inland Lakes and Streams Act
Section 2(j)

Please see the above section for discussion of the revocation-modification issue. The state authority adequately encompasses the causes for modification set out by this regulation. This is most clearly demonstrated through yet another look at the now familiar authority of the state of Michigan to (1) impose restrictions, or conditions on the issuance of a permit, and (2) revoke permits for noncompliance with such conditions. The simplest way to insure that these causes are grounds for modification, then, is to condition the permit upon their nonoccurrence.

Even without this permit-drafting tip, however, existent state authority seems to embrace the denoted instances as causes for termination - and, thus, also modification - of an issued permit. A clause-by-clause analysis follows.

Alterations. As to wetlands, this clause is specifically met in 40 CFR 11(2)(c) of the Wetland Protection Act and requires no discussion. The authority for the remaining 404 waters, which, incidentally, is applicable

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

"(The Water Resources Commission) shall take all appropriate steps to prevent any pollution which is deemed by the commission to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream, or other waters of the state."
Water Resources Act
Section 5

"A permit may be revoked...for...any misrepresentation in application."
Inland Lakes and Streams Act
Section 5

"A permit shall specify that a project...shall not cause unlawful pollution as defined in (the Water Resources Commission Act)."
Inland Lakes and Streams Act
Section 7

"It shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to (the waters)."
Water Resources Act
Section 6(a)

"...If it appears that a minor modification of the application would result in the granting of the permit, the nature of modification shall be stated..."
Inland Lakes and Streams Act
Section 6(5)

to wetlands as well - stems from a simple, logical reading of the Inland Lakes and Streams Act and the basic theory behind it.

Briefly, legislation such as Michigan's Inland Lakes and Streams Act and Wetland Protection Act prohibits certain uses or development of the statutory waters unless a state agency reviews the project and specifically finds it statutorily unobjectionable. A favorable decision is reflected by a permit issued to the applicant which allows him/her/it to proceed with the project. A "substantial alteration or addition" to a project, then, could not be allowed without a new permit or modification under any sane reading of either of these state laws.

The specific authority that compels this conclusion can flow from a number of sources, depending on how one views such project alterations. That is, it could be seen either as an entirely new project - thus requiring an entirely new permit embracing applicable new conditions - or as an unauthorized extension of the scope of the original permit - a revocable misdeed as a violation of the permit. Under state law, then, the end result is the same: The state has the authority to modify a permit in the face of a project alteration or addition.

Information. As was, and is, the case with the other specified causes for modification, this reason could most easily be covered by incorporating the right to modify upon the occurrence of the cause into the text of the original permit. Beyond this truly comprehensive approach, however, the question of whether this cause is encompassed by Michigan authority is nevertheless disposed of handily by existent law. For one thing, it is quite likely that any information that

(2) Information. The director has received information. Permits...may be modified during their term for this cause only if the information was not available at the time of permit issuance...and would have justified the application of different permit conditions at the time of issuance.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

"would have justified different permit conditions at the time of issuance" would necessarily qualify as an alteration or addition to the activity and thus be covered under the proceeding subsection. Even if such is, somehow, not the case, however, the quoted powers given the state agencies certainly provide for adequate authority to deal with any such influx of new information as required by the federal regulation.

New Regulations. Given the existence of the broad powers of state agencies, as set out in the statutes cited, to assure that permitted projects fully comply with state and federal law, standards and regulations, this required cause for modification presents no problem.

(3) New regulations. The standards of regulation on which the permit was based have been changed by promulgation of amended standards or regulations or by judicial decision after the permit was issued. Permits...may be modified during their terms for this cause only as follows:

(i) For promulgation of amended standards, or regulations when:

(A) The permit condition requested to be modified was based on a promulgated Part 260-266 (RCRA) or Part 146 (UIC) regulation, or a promulgated effluent limitation guideline or EPA approved or promulgated water quality standard (NPDES); and

(B) EPA has revised, withdrawn, or modified that portion of the regulation or effluent limitation guideline on which the permit condition was based, or has approved a state action with regard to a water quality standard on which the permit condition was based; and

(C) A permittee requests modification in accordance with 40 CFR 124.5 within ninety (90) days after Federal Register notice of the action on which the request is based.

(ii) For judicial decisions, a court of competent jurisdiction has remanded and stayed EPA promulgated regulations or effluent limitation guidelines, if the remand and stay concern that portion of the regulations or guidelines on which the permit condition was based and a request is filed by the permittee in accordance with 40 CFR 124.5 within ninety (90) days of judicial remand.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(4) Compliance schedules. The director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage or other events over which the permittee has little or no control and for which there is no reasonably available remedy.

(6) For 404 only, the director shall modify a permit to reflect toxic effluent standards or prohibitions or water quality standards, under the "reopener" condition of 40 CFR 123.97(g).

(b) Causes for modification or revocation and reissuance. The following are causes to modify or alternatively, revoke and reissue a permit:

(1) Cause exists for termination under 40 CFR 122.16, and the director determines that modification or revocation and reissuance is appropriate.

(2) The director has received notification (as required in the permit, see 40 CFR 122.17(1)(3)) of a proposed transfer of a permit.

40 CFR 123.7(a)(11)
(40 CFR 122.16)

(a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

(1) Noncompliance by the permittee with any condition of the permit.

(2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or

"(1) A general permit may be revoked or modified if...the department determines that the activities authorized by the general permit have an adverse impact on the environment or the activities would be more appropriately authorized by an individual permit.

(2) A permit may be terminated or modified for cause, including:

(a) A violation of a condition of the permit.

Compliance Schedules. Inasmuch as these schedules are discretionary on the part of the director and are imposed by an exercise of the state's authority to impose conditions on permits, there is no foreseeable difficulty in specifying that the condition (i.e. the compliance schedule) may be altered or modified upon the occurrence of certain events as specified in the regulation.

Toxic Effluent Standards. As will be further discussed below, this requirement merely mandates another condition that must be included in a 404 permit - namely, that the permit is always subject to modification upon the enactment of new toxic standards. Again, the state unquestionably has adequate legal authority to comply with this requisite.

Subsection (1) of this regulation, of course, requires no discussion - it merely outlines one discretionary policy option available to state programs. Subsection (2) also offers no threat to Michigan's authority to assume the 404 program. (See discussion of 40 CFR 122.14.)

Michigan law fully covers the causes for termination set out in this regulation. As to wetlands, the state statute directly traces the federal causes of termination. The additional federal cause in subsection (3) is also encompassed within the authority of 2(c) of the Wetland Protection Act.

Although the Inland Lakes and Streams Act does not quite as precisely parallel the federal requirements, Michigan's statutory authority certainly allows for such permit

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination;

(4) (P)ermits may be modified or terminated when there is a change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit.

(b) Obtaining a permit by misrepresentation or failure to fully disclose relevant facts.

(c) A change in condition that requires a temporary or permanent change in the activity." Wetland Protection Act Section 11

"A permit may be revoked...for violation of any of its provisions, any provision of this act, any rule promulgated under this act or any misrepresentation in application."

Inland Lakes and Streams Act Section 8

"A permit shall specify that a project completed in accordance with this act shall not cause unlawful pollution as defined by (the Water Resources Commission Act)."

Inland Lakes and Streams Act Section 7

"It shall be unlawful for any persons directly or indirectly to discharge into the waters of the state any substance which is or may become injurious to the public health, safety or welfare or which is or may become (otherwise injurious to the waters of this state)."

Water Resources Act Section 6(a)

terminations in waters not covered by the Wetland Protection Act. The first two regulation subsections, of course, are patently included in the Inland Lakes and Streams Act and require no discussion. As to the last two federal causes, there are two approaches which demonstrate Michigan's authority to so terminate permits.

First, and, again, by far the most efficient and effective procedure, the state may include such causes for termination as conditions on the original permit. This authority has been exhaustively documented in preceding sections of this analysis.

Irregardless of the existence of such a permit condition, however, authority to so terminate permits is readily found by reading the Inland Lakes and Streams Act, Sections 7 and 8, in conjunction with Section 6 of the Water Resources Commission Act. Briefly, the last two causes are within the definition of "unlawful pollution" as set out in the Water Resources Act. Section 7 of the Inland Lakes and Streams Act decrees that any project constructed shall not cause pollution and Section 8 authorizes the revocation of a permit for violation of a provision of the act. Thus, such activities constitute causes for permit revocation under existent Michigan law.

40 CFR 123.7(a)(17)
(40 CFR 122.18)

The director shall prepare quarterly and annual reports as detailed below. When the state is the permit-issuing authority, the state director shall submit any reports required under this section to the regional administrator. When EPA is the permit-issuing authority, the regional administrator shall submit any report required under this section to EPA headquarters.

This section of the federal regulations, although included in the interest of completeness, is of an operational nature rather than being in any way concerned with the state's authority to assume the 404 program. There is, at any rate, no existent legal impediment to the state complying with the requirement of this section upon assumption of the permit program.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(b) Quarterly reports for state 404 programs. The director shall submit noncompliance reports for 40 CFR 404 discharges specified under 40 CFR 123.6(f)(1)(i)(A)(E) containing the following information:

(1) Name, location, and permit number of each noncomplying permittee;

(2) A brief description and date of each instance of noncompliance, which should include the following:

(i) Any unauthorized discharges of dredged or fill material subject to the state's jurisdiction.

(ii) A description of investigations conducted and of any enforcement actions taken or contemplated.

(d) Annual reports for state 404 programs. The state director shall submit to the regional administrator an annual report assessing the cumulative impacts of the state's permit program on the integrity of state regulated waters. This report shall include:

(1) The number and nature of individual permits issued by the state during the year. This should include the locations and types of water bodies where permitted activities are sited (for example, wetlands, rivers, lakes and other categories which the director and regional administrator may establish);

(2) The number of areas of each of the categories of waters in paragraph (d)(1) of this section which were filled or which received any discharge or dredged material during the year (either by authorized or known unauthorized activities);

(3) The number and nature of permit applications denied and permits modified, revoked and reissued, or terminated during the year;

(4) The number and nature of permits issued under emergency conditions, as provided in 40 CFR 123.96;

(5) The approximate number of persons in the state discharging dredged or fill material under general permits and an estimate of the cumulative impact of these activities.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(e) Schedule.

(1) For all quarterly reports. On the last working day of May, August, November, and February, the state director shall submit to the regional administrator information concerning noncompliance with RCRA, UIC, NPDES, and state 404 permit requirements by major dischargers (or for 404, other dischargers specified under 40 CFR 123.6(f)(1)(i)(A)-(E)) in the state in accordance with the following schedule. The regional administrator shall prepare and submit information for EPA-issued permits to EPA headquarters in accordance with the same schedule:

Quarters covered by reports on noncompliance by major discharges (date for completion of reports):

January, February, and March--May 31
April, May, and June--Aug 31
July, August and September--Nov 30
October, November, and December--Feb 28
Reports must be made available to the public for inspection and copying on this date.

(2) For all annual reports. The period for annual reports shall be for the calendar year ending December 31, with reports completed and available to the public no more than 60 days later.

40 CFR 123.7(a)(13)

(40 CFR 122.19(b))

Claims of confidentiality for the following information will be denied:

(1) The name and address of any permit applicant or permittee;

(2) effluent data.

40 CFR 123.7(a)(14)

(40 CFR 124.3(a))

Applications are not required for...404 general permits (40 CFR 123.95).

This section requires no discussion; it is simply a policy statement outlining the EPA's position as to the confidentiality of information supplied to it pursuant to the Clean Water Act and federal regulations. No question of the state's authority is involved.

General permits, the only pertinent part of this regulation in terms of 404, is discussed elsewhere in this analysis.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 123.7(a)(15)
(40 CFR 124.5)

(a) Permits...may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the director's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in 40 CFR 122.15 or 122.16. All requests shall be in writing and shall contain facts or reasons supporting the request.

(1) If the director tentatively decides to modify or revoke and reissue a permit under 40 CFR 122.15, he or she shall prepare a draft permit under 40 CFR 124.6 incorporating the proposed changes. The director may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the director shall require the submission of a new application.

(2) In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(3) "Minor modifications" as defined in 40 CFR 122.17 are not subject to the requirements of this section.

(d) If the director tentatively decides to terminate a permit under 40 CFR 122.16, he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under

In terms of state authority, this subsection has already been dealt with in the analyses of 40 CFR 122.15 and 122.16. The rest of the subsection requires no discussion in that it is advisory in nature.

This section also presents no problem and does not require extensive analysis. Subsection (1) is but the logical extension of the reasoning employed in noting that the state's authority to modify or revoke a permit would be of dubious value without having the parallel power to require new application information upon which to base the new permit conditions. Subsections (2) and (3) are similarly innocuous in that they are essentially procedural directives requiring no analysis of state authority.

As the notice of intent to terminate is a type of draft permit, please note the discussion of 40 CFR 124.6 relating to draft permits.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 124.6. In the case of EPA-issued permits, a notice of intent to terminate shall not be issued if the regional administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved state under 40 CFR 123.6(b)(1).

(f) Any request by the permittee for modification to an existing 404 permit (other than a request for a minor modification as defined in 40 CFR 122.17) shall be treated as a permit application and shall be processed in accordance with all requirements of 40 CFR 124.3.

40 CFR 123.7(a)(16)
(40 CFR 124.6)

(a) Once an application is complete, the director shall tentatively decide whether to prepare a draft permit (except in the case of state section 404 permits for which no draft permit is required under section 123.100) or to deny the application.

(c) If the director tentatively decides to issue a 404 general permit, he or she shall prepare a draft general permit under paragraph (d) of this section.

(d) If the director decides to prepare a draft permit, he or she shall prepare a draft permit that contains the following information:

(1) All conditions under 40 CFR 122.7 and 122.8;

(2) All compliance schedules under 40 CFR 122.10;

(3) All monitoring requirements under 40 CFR 122.11; and

(4) For:

(iv) 404 permits, permit conditions under 40 CFR 123.97 and 123.98;

(e) Draft permits prepared by a state shall be accompanied by a fact sheet if required under 40 CFR 124.8.

This requirement for an application wholly conforms with previously quoted state authority requiring the submission of an application.

"The department may impose conditions on a permit for a use or development..."

Wetland Protection Act
Section 10(2)

"The (water resources) commission...may set permit restrictions which will assure compliance with applicable federal law and regulations..(and it) may make rules and orders restricting the polluting content of any waste material or polluting substance discharge or sought to be discharged into any...waters of the state."

Water Resources Act
Section 5

"A permit may specify the term and conditions under which the work is to be carried out."

Inland Lakes and Streams Act
Section 8

As has been repeatedly noted, the DNR has broad powers to condition the permitting of any activity that comes within the purview of the 404 program. This power certainly constitutes adequate state authority--as required by these regulations--to issue draft permits in any particular case. Additionally, of course, the contents and form of such draft permits are allowed for by the same authority.

See the following section.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 123.7(a)(17)
(40 CFR 124.8)

(a) A fact sheet shall be prepared for every draft permit for a major...404...facility or activity, for every 404...general permit (40 CFR 123.95), and for every draft permit which the director finds is the subject of wide-spread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The director shall send this fact sheet to the applicant and, on request, to any other person.

(b) The fact sheet shall include, when applicable:

(1) A brief description of the type of facility or activity which is the subject of the draft permit;

(2) The type and quantity of wastes, fluids or pollutants which are proposed to be or are being...discharged.

(4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;

(5) Reasons why any requested variances or alternatives to required standards do or do not appear justified;

(6) A description of the procedures for reaching a final decision on the draft permit including:

(i) The beginning and ending dates of the comment period under 40 CFR 124.10 and the address where comments will be received;

(ii) Procedures for requesting a hearing and the nature of that hearing; and

(iii) Any other procedures by which the public may participate in the final decision.

(7) Name and telephone number of a person to contact for additional information.

These procedural requirements for draft permits issued are certainly met by the same authority that empowers the state to issue draft permits (see analysis of 40 CFR 124.6).

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 7(a)(18)
(40 CFR 124.10)

(a)(1) The director shall give public notice that the following actions have occurred:

(ii) A draft permit has been prepared under 40 CFR 124.6(d);

(iii) A hearing has been scheduled under 40 CFR 124.12;

(v) A state section 404 application has been received in cases when no draft permit will be prepared.

"The department shall prepare a biweekly list of the applications...and shall promptly mail copies of the list...to the persons who requested notice."

Wetland Protection Act
Section 8(3)

"...the department shall promptly send a copy of the permit application to the municipality where the wetland is located."

Wetland Protection Act
Section 8(5)

"The department shall promptly mail copies of the (application) list to the persons who have so requested notice."

Inland Lakes and Streams Act
Section 6(1)

"The department may approve or disapprove a permit application without a public hearing unless a person requests a hearing within 20 days after the mailing of notification."

Wetland Protection Act
Section 8(1)

"...unless a written request is filed with the department within 20 days after the submission (to the parties who receive notice) for review, the department may grant the application without a...hearing."

Inland Lakes and Streams Act
Section 6(2)

"Notice of the hearing shall be made in the same manner as...under (the Administrative Procedures Act)."

Wetland Protection Act
Section 8(1)

"...notice of a public hearing...shall be given...not less than 10 days nor more than 60 days before the public hearing."

Administrative Procedures Act (APA)
Section 41(1)

Authority for the public notice mentioned in this regulation is cited in subsequent sessions of this analysis.

Since these state statutes only give the DNR the option of approving a permit after the stated time period has elapsed, the department certainly has the authority to comply with the 30 day time period denoted in the federal regulation.

Again, the state is quite authorized by these provisions to give the period of notice called for by this regulation.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.)

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(c) Public notice of activities described in paragraph (a)(1) of this section shall be given by the following methods:

(1) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his or her right to receive notice for any classes and categories of permits):

(i) The applicant;

(ii) Any other agency which the director knows has issued or is required to issue a ...404 permit for the same facility or activity;

(iii) Federal and state agencies, with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, and other appropriate government authorities, including any affected states;

(iv) For NPDES and 404 permits only, any state agency responsible for plan development under CWA section 208(b)(2), 208(b)(4) or 308(e) and the U.S. Army Corps of Engineers,

"At least 10 days notice of a hearing...shall be given by...publication...and by mailing."

Inland Lakes and Streams Act
Section 6(4)

"The notices shall be by mail or otherwise in writing to the last address."

Administrative Procedures Act
Section 41(2)

"If the department denies, or requests a modification of, the permit application, the department shall send notice of the denial or modification request."

Wetland Protection Act
Section 8(2)

"At least 10 days notice of a hearing... shall be given...by mailing copies...to... the persons...entitled to receive a copy of the applicant pursuant to subsection (2)."

Inland Lakes and Streams Act
Section 6(4)

"Upon receiving an application, the department shall submit copies for review to... the persons required to be in the application."

Inland Lakes and Streams Act
Section 6(2)

Though notices to the applicant seems rather obvious, the quoted Michigan statutes amply support such a practice.

Notices to interested state or federal agencies can easily be maintained under existent Michigan authority.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;

(vi) For 404 permits only, any reasonably ascertainable owner of property adjacent to the regulated facility or activity and the regional director of the Federal Aviation Administration if the discharge involves the construction of structures which may affect aircraft operations or for purposes associated with seaplane operations;

"In addition to the completed application form, the applicant shall submit the following:

(c) ...the names and addresses of adjacent or opposite riparians."
DNR Rule 281.812(1)(c)

"Upon receiving an application, the department shall submit copies for review to... the persons required to be in the application."
Inland Lakes and Streams Act
Section 6(4)

"At least 10 days notice of a hearing... shall be given...by mailing copies...to... the persons...entitled to receive a copy of the application pursuant to subsection (2)."

Inland Lakes and Streams Act
Section 6(4)

The series of provisions cited plainly demonstrates the state's present practice of providing notice to adjacent property owners. The additional noticing authority--that is to the FAA and adjacent wetland owners to 404 projects not within the realm of the Inland Lakes and Streams Act--is also within the ambit of present state authority.

(viii) Persons on a mailing list developed by:

(A) Including those who request in writing to be on the list;

(B) Soliciting persons for "area lists" from participants in past permit procedures in that area; and

(C) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and state funded newsletters, environmental bulletins, or state law journals. (The director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The director may delete from the list the name of any person who fails to respond to such a request.)

"A person who desires notification of pending permit applications may make a written request to the department... The department shall prepare a...list of applications... and...promptly mail copies...to the persons who requested notice."

Wetland Protection Act
Section 8(3)

"A person who desires notification of pending applications may make a written request to the department... The department shall prepare a...list...and...promptly mail copies...to the persons who have so requested notice."

Inland Lakes and Streams Act
Section 6(1)

The Michigan statutes squarely satisfy subsection (A) of this requirement.

The other two subsections are really policy directives rather than state requirements and thus need no discussion.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(2) For major permits and general permits, publication of a notice in a daily or weekly newspaper within the area affected by the facility or activity;

"The department, after notice and opportunity for a public hearing, may issue general permits..."
Wetland Protection Act
Section 10(1)

The cited state statutes authorize the type of notice suggested by this regulation.

"At least 10 days notice of a hearing... shall be given by the publication in a newspaper circulated in the county where the project is to be located."
Inland Lakes and Streams Act
Section 6(4)

(3) When the program is being administered by an approved state, in a manner constituting legal notice to the public under state law; and

"The agency shall publish the notice as prescribed in any applicable statute, or if none then in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the (action). Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in 1 or more newspapers of general circulation, or, when appropriate, in trade, industry, governmental or professional publications. If the persons likely to be affected...are unorganized or diffuse in character and location, then the agency shall publish the notice as a display advertisement in at least 3 newspapers of general circulation in different parts of the state."

In terms of authority, this requisite really needs no discussion; that is, the state necessarily has the authority to give notice that is considered legal notice under its own law. The requirement, then, is of a more operational or directional nature, guiding the states once they do assume the 404 program.

Administrative Procedures Act
Section 42

(4) Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

"The agency shall publish the notice as prescribed in any applicable statute, or if none then in a manner selected by the agency as best calculated to give notice to persons likely to be affected."

Administrative Procedures Act
Section 42

This requirement is, again, of a more operational nature. It speaks to the state agencies at their discretion giving the types of notice that will be most effective in any individual case. The cited state provision exemplifies the state's acceptance of such a concept.

(d) Contents.
(1) All public notices. All public notices issued under this part shall contain the following minimum information:

"The biweekly list (of permit applications) that is sent out to those who request it) shall state the name and address of each applicant, the location of the wetland in

This is another federal requirement that is essentially concerned with the operation of the state's program once it has been assumed, rather than its initial authority to assume it.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(i) Name and address of the office processing the permit action for which notice is being given;

(ii) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of 404 draft general permits under section 123.95;

(iii) A brief description of the business conducted at the facility or activity described in the permit application or the draft permit, for 404 general permits when there is no application;

(iv) Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, as the case may be, statement of basis or fact sheet, and the application; and

(v) A brief description of the comment procedures required by 40 CFR 124.11 and 124.12 and the time and place of any hearing that will be held, including a statement of procedure to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision.

(viii) For 404 permits only:

(A) The purpose of the proposed activity (including in the case of fill material, activities intended to be conducted on the fill), a description of the type, composition, and quantity of materials to be discharged and means of conveyance; and any proposed conditions and limitations on the discharge;

(B) The name and water quality standards classification, if applicable, of the receiving waters into which the discharge is proposed, and a general description of the site of each proposed discharge and the portions of the site and the discharges which are within state regulated waters;

(C) A description of the anticipated environmental effects of activities conducted under the permit;

the proposed use or development including the size of both the proposed use or development and of the wetland affected, and a summary statement of the purpose of the use or development."

Wetland Protection Act
Section 8(3)

"The monthly list shall state the name and address of each applicant, the legal description of the lands included in the applicant's project and a summary statement of the purpose of the project."

Inland Lakes and Streams Act
Section 6(1)

"Upon receiving an application, the department shall submit copies for review to... the persons required to be in the application."

Inland Lakes and Streams Act
Section 6(2)

Nevertheless, state law does substantially provide for including the information laid out in the regulation. Persons on the voluntary permit application lists are provided for and those who, under previously quoted Michigan provisions, are entitled to receive copies of the application itself are, of course, privy to the abundance of information concerning the project that is found therein.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(D) References to applicable statutory or regulatory authority; and

(E) Any other available information which may assist the public in evaluating the likely impact of the proposed activity upon the integrity of the receiving water.

(ix) Any additional information considered necessary or proper.

(2) Public notices for hearings. In addition to the general public notice described in paragraph (d)(1) of this section, the public notice of a hearing under 40 CFR 124.12, subpart E, or subpart F, shall contain the following information:

(i) Reference to the date of previous public notices relating to the permit;

(ii) Date, time and place of the hearing;

(iii) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures; and

(iv) For 404 permits only, a summary of major issues raised to date during the public comment period.

(e) In addition to the general public notice described in paragraph (d)(1) of this section, all persons identified in paragraphs (c)(1)(i), (ii), (iii), and (iv) of this section shall be mailed a copy of the fact sheet or statement of basis (for EPA-issued permits), the permit application (if any) and the draft permit (if any).

40 CFR 123.7(a)(19)
(40 CFR 124.1)

During the public comment period provided under 40 CFR 124.10, any interested person may submit written comments on the draft permit or the permit application for 404 permits when no draft permit is required (see 40 CFR 123.100) and may request a public hearing if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be

"The public notice shall include:

(b) The time and place of the public hearing and a statement of the manner in which data, views and arguments may be submitted to the agency at other times by any person."

Administrative Procedures Act
Section 41

This procedural suggestion requires no analysis of state authority.

"The department may approve or disapprove a permit application without a public hearing unless a person requests a hearing within 20 days after the mailing of notification."
Wetland Protection Act
Section 8(1)

"...unless a written request is filed with the department within 20 days after the submission (to the parties who receive notice) for review, the department may grant an

As was already touched on, present authority does not explicitly mention the acceptance or consideration of comments. However, as is apparent from the provisions set out, such input is assured by allowing anyone who receives notice to request a public hearing within 20 days of notice.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in 40 CFR 124.17.

40 CFR 123.7(a)(20)
(40 CFR 124.12)

(a) The director shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s). The director also may hold a public hearing at his or her discretion whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. Public notice of the hearing shall be given as specified in 40 CFR 124.10.

40 CFR 123.7(a)(21)
(40 CFR 124.17)

(a) At the time that any final permit decision is issued under 40 CFR 124.15, the director shall issue a response to comments. States are only required to issue a response to comments when a final permit is issued. This response shall:

(1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(2) Briefly describe and respond to all significant comments on the draft permit or the permit application (for section 404 permits only) raised during the public comment period, or during any hearing.

(c) The response to comments shall be available to the public.

application without a...hearing."
Inland Lakes and Streams Act
Section 6(2)

"...after receipt of the completed application and fee, the department may hold a hearing...the department may approve or disapprove a permit application without a public hearing unless...the department determines the permit application is of significant impact to warrant a public hearing."
Wetland Protection Act
Section 8(1)

"The department may hold a public hearing on pending applications."
Inland Lakes and Streams Act
Section 6(1)

"Sec. 9. (1) A permit for an activity listed in section 5 shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefits derived from the activity, and that the activity is otherwise lawful."
Wetland Protection Act

"Sec. 6. (5) ...When a permit is denied, the department shall provide to the applicant a concise written statement of its reasons for denial of the permit, and if it appears that a minor modification of the application would result in the granting of the permit, the nature of the modification shall be stated..."

"Sec. 7. The department shall issue a permit if it finds that the structure or project will not adversely affect the public trust or riparian rights. In passing upon an application, the department shall consider the possible effects of the proposed action upon the inland lake or stream and waters from which or into which its waters flow and the uses of all such waters..."
Inland Lakes and Streams Act

The quoted state laws amply provide for this requirement of allowing the responsible state agency to hold hearings, as necessary, on permit applications.

Under existing state statutes, the department must make such findings at the time of permit issuance or denial. The department must address all relevant impacts and issues regardless of their source from comments or otherwise.

40 CFR 123.7(e)

(1) State 404 permit programs shall have an approved continuing planning process under 40 CFR 35.1500 and shall assure that the approved planning process is at all times consistent with CWA.

"The water resources commission is designated the state agency to cooperate and negotiate with other governments, governmental units and agencies thereof in matters concerning the water resources of the state, including but not limited to flood control, beach erosion control and water quality control planning, development and management."

Water Resources Act
Section 2a(1)

"The commission may make or cause to be made surveys, studies, and investigations of the uses of waters of the state, both surface and underground, and cooperate with other governments, and governmental units and agencies...in making the surveys, studies, and investigations."

Water Resources Act
Section 2(1)

(2) State 404 programs shall ensure that any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years receive a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(i) For the purposes of this paragraph:

(A) "Board or body" includes any individual, including the director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(B) "Significant portion of income" means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(C) "Permit holders or applicants for a permit" does not include any department or agency of a state government, such as a Department of Parks or a Department of Fish and Wildlife.

(D) "Income" includes retirement benefits, consultant fees and stock dividends.

(ii) For the purposes of this subparagraph, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments, or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

40 CFR 35.1500 "establishes policies, program requirements, and procedures for water quality management, planning and implementation under the Clean Water Act." The cited Michigan law demonstrates the authority of the commission to maintain a continued planning process under the regulation.

"Present statutes of the State of Michigan provide for the appointment of members of the Commission of Natural Resources and Water Resources Commission, being those Commissions responsible for the administration of the Inland Lakes & Streams Act, the Wetlands Act and the Water Resources Commission Act. My review of the provisions of law relating to the appointment of commission members indicates that those acts do not require membership of individuals whose source of income would result in the violation of the federal standards. Constitutional provisions and case law explanatory thereof require the two commissions and any other state regulatory agency be impartially imposed. In Johnson

v Milkboard, 295 Mich 644, 657 (1940), the Michigan Supreme Court held that the Michigan Milk Marketing Board, established to fix the wholesale and retail prices of milk with the Detroit Milk Marketing Board was unconstitutionally composed. In striking the statute, the court reasoned as follows:

"No claim is made that any member of the present board has acted unfairly or arbitrarily, but the fact remains that the act requires the employment of a board, a majority of whose members have a direct pecuniary interest in the matter submitted to them. Several states have provided for boards of a like nature, but examination of the authorities discloses that no question has been raised as to the composition of such boards.

"In order that the administration of the milk industry be conducted in a fair and impartial manner, it is essential that the board be impartial in its composition."

"We have not examined any documentation, affidavits, etc., from members of the current board which would allow us to conclude whether or not any of the current members derive income directly or indirectly from permit holders or applicants for a permit. With regard to continuing membership on the two state commissions identified, the fact that the member received a significant portion of his income within the previous two years directly or indirectly from permit holders or applicants for a permit would not be the basis for his or her disqualification or removal as a commission member. The commission member, of course, could not under current state law vote on the issuance of a permit to himself.

"With regard to state employees who might be called upon to review permit applications and make recommendations with regard to their issuance, we note that rules of the civil service commission provide:

"1.5 Conflict of Interest. A state classified employee shall not:

"1.5b. Engage in any business transaction or private arrangement for personal financial gain or financial gain for a member of the employee's immediate family, which accrues from or is based on the employee's official position or on confidential information gained by reason of the employee's position.

"1.5c. Solicit, accept or agree to accept anything of value under any circumstances which could reasonably be expected to influence the manner in which the employee performs work or makes decisions.

"1.5f. Have any substantial interest nor shall a member of the employee's immediate family have such interest, in any business or industry concerning which the employee directly, in a significant decision-making capacity, participates on behalf of the state in the regulation, enforcement, auditing, licensing or purchasing of any goods or services.

"1.6c. Each appointing authority shall promulgate procedures to implement disclosure requirements, and shall inform all employees and prospective employees of those procedures and the regulations governing conflict of interest."

40 CFR 123.8

(a) State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

(b) State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. The state shall maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the state director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index, or inventory shall be made available to the regional administrator upon request.

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

(i) Determine compliance or noncompliance with issued permit conditions and other program requirements;

(ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and

(iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information.

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations. Public effort in reporting violations shall be encouraged, and the state director shall make available information on reporting procedures.

(c) The state director and state officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the

"The department shall require the holder of a permit to provide information the department reasonably requires to obtain compliance with this act."

Wetland Protection Act
Section 12(1)

"The application...shall include any information that may be required by the department."

Inland Lakes and Streams Act
Section 5(1)

"Upon reasonable cause or obtaining a search warrant, the department may enter on, upon, or through the premises on which an activity...is located or on which information required to be maintained...is located."

Wetland Protection Act
Section 12(2)

"The commission or any agent duly appointed by it shall have the right to enter at all reasonable times in or upon any private or public property for the purpose of inspecting and investigating conditions relating to the pollution of any waters and the obstruction of the floodways of the rivers and streams of this state."

Water Resources Act
Section 4

Although the thrust of this regulation is procedural, Michigan nevertheless already possesses the type of authority necessary to implement such programs. The enforcement issue is dealt with in subsequent sections.

Again, this regulation is apparently designed to give guidance to the states in constructing their 404 permit programs. In terms of authority, the key to this section seems to be the power of the state agency to compile information, if necessary, beyond what the applicant is required to submit. The quoted state statutes quite clearly provide for such powers. The rest of the regulation elaborates the rationale or reasons for such investigative power or authority and thus requires no discussion.

The authority quoted in the above section directly assures compliance with the requirements of this regulation.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

state program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conforms with this requirement.

(d) Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court.

40 CFR 123.9

(a) Any state agency administering a program shall have available the following remedies for violation of state program requirements:

(1) To restrain immediately and effectively any person by order or by suit in state court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment; (Note: This paragraph requires that states have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.

This operational requirement involves no question of the state's legal authority.

As is quite apparent, Michigan has broad authority for the exertion of quick injunctive judicial powers.

"The attorney general may commence a civil action for...injunctive relief."
Wetland Protection Act
Section 14(1)

"If it clearly appears...that immediate and irreparable injury, loss, or damage, or physical injury will result...a restraining order may be issued ex parte pending the hearing on the motion or order to show cause."
Michigan General Court Rule, 1963
718.2(1)

"The department may commence a civil action ...to restrain violation of this act or any actions contrary to an order of the department denying a permit, (or) to enjoy the further performance of, or order the removal of, any project which is undertaken contrary to this act."
Inland Lakes and Streams Act
Section 13(1)

"The attorney general, any political subdivision of the state (or) any...agency of the state...may maintain an action in the circuit court...for declaratory and equitable relief against...any...legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."
Environmental Protection Act
Section 2(1)

"...the court may grant temporary and permanent equitable relief."
Environmental Protection Act
Section 4(1)

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(2) To sue in courts of competent jurisdiction to enjoy any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;

"The department may commence a civil action ...to restrain violation of this act or any action contrary to an order of the department..., to enjoin...any project which is undertaken contrary to this act."

Inland Lakes and Streams Act
Section 13(1)

"If administrative...proceedings are required...the court may remit the parties to such proceedings... In so remitting the court may grant temporary equitable relief where necessary."

Environmental Protection Act
Section 4(2)

Although with the other authority quoted above, this section of MEPA shows the concern of Michigan to provide fast and effective remedies to prevent the destruction of the environment. There is, furthermore, nothing in Michigan's law that requires the revocation of a permit prior to resorting to the judicial system.

(3) To assess or sue to recover in court civil actions and to seek criminal remedies, including fines, as follows:

(iii)(A) Civil penalties shall be recoverable for the violation of any 404 permit condition; any 404 filing requirement; and duty to allow or carry out inspection, entry or monitoring activities by the state director. Such penalties shall be assessable in at least the amount of \$5,000 per day for each violation.

"If, on the basis of information available to the department, the department finds that a person is in violation of this act or a condition set forth in a permit..., the department shall issue an order...to comply ...or...shall request the attorney general to bring a civil action."

Wetland Protection Act
Section 13(1)

As can be seen from the cited Michigan provisions, civil penalties are indeed provided for and, as required by the regulation, are assessable in the amount of \$5,000.00 for each day of violation.

"The department may commence a civil action ...to enforce compliance with this act."

Inland Lakes and Streams Act
Section 13(1)

"The attorney general may commence a civil action...the court may impose a civil fine of not more than \$10,000.00 per day of violation. A person who violates an order of the court shall be subject to a civil fine not to exceed \$10,000.00 for each day of violation."

Wetland Protection Act
Section 14(1)

"...the circuit court...may assess a civil fine of not more than \$5,000.00 per day for each day of violation."

Inland Lakes and Streams Act
Section 13(2)

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(B) Criminal fines shall be recoverable against any person who wilfully or negligently violates any applicable standards or limitations; and 404 permit conditions; or any 404 filing requirement. Such fines shall be assessable in at least the amount of \$10,000 per day for each violation.

"A person who wilfully or recklessly violates a condition or limitation in a permit issued by the department under this act...is guilty of a misdemeanor, punishable by a fine of not more than \$25,000.00 per day of violation.

Wetland Protection Act
Section 14(3)

The denoted state statutes demonstrate the state's authority to assure compliance with this regulation; criminal fines are provided for and they are assessable in the amount of \$10,000.00 per day of violation. The Inland Lakes omission of the adjective "wilfully" is but an example of a state having more stringent standards.

"...a person who violates this act, or a permit condition is guilty of a misdemeanor, punishable by a fine of not more than \$10,000.00 per day for each day of violation."

Inland Lakes and Streams Act
Section 13(3)

(C) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation, or certification in any notice or report required by a section 404 permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the director. Such fines shall be recoverable in at least the amount of \$5,000 for each instance of violation.

"A person who wilfully or recklessly violates a condition or limitation in a permit...or a corporate officer who has knowledge of or is responsible for a violation, is guilty of a misdemeanor, punishable by a fine of not less than \$2,500.00 nor more than \$25,000.00 per day of violation."

Wetland Protection Act
Section 14(3)

The Inland Lakes and Streams Act, of course, meticulously tracks the intent of this regulation. Though less specific, the wetlands language also clearly complies with the requirement. They both also provide for the assessment of the \$10,000.00 fine mentioned in the regulation.

"A person who knowingly makes a false statement, representation, or certification in an application for a permit; in a notice or report required by a permit; or a person who knowingly renders inaccurate any monitoring device or method required to be maintained by a permit is guilty of a misdemeanor, punishable by a fine of not more than \$10,000.00 per day for each day of violation."

Inland Lakes and Streams Act
Section 13(4)

(b)(1) The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

A perusal of the language concerning the penalties quoted above confirms that the requirements of this regulation are wholly met.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(2) The burden of proof and degree of knowledge or intent required under state law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate act.

(c) Any civil penalty assessed, sought or agreed upon by the state director under paragraph (a)(3) of this section shall be appropriate to the violation. A civil penalty agreed upon by the state director in settlement of administrative or judicial litigation may be adjusted by a percentage which represents the likelihood of success in establishing the underlying violation(s) in such litigation. If such civil penalty, together with the costs of expeditious compliance, would be so severely disproportionate to the resources of the violator as to jeopardize continuance in business, the payment of the penalty may be deferred or the penalty may be forgiven in whole or in part, as circumstances warrant. In the case of a penalty for a failure to meet a statutory or final permit compliance deadline, "appropriate to the violation", as used in this paragraph, means a penalty which is equal to:

(1) An amount appropriate to redress the harm or risk to public health or the environment; plus

(2) An amount appropriate to remove the economic benefit gained or to be gained from delayed compliance; plus

(3) An amount appropriate as a penalty for the violator's degree of recalcitrance, defiance, or indifference to requirements of the law; plus

(4) An amount appropriate to recover unusual or extraordinary enforcement costs thrust upon the public; minus

(5) An amount, if any, appropriate to "reflect any part of the noncompliance attributable to the government itself; and minus

"The attorney general may commence a civil action for appropriate relief..."

Wetland Protection Act
Section 14(1)

"Any civil penalty assessed, sought or agreed to by the department shall be appropriate to the violation."

Inland Lakes and Streams Act
Section 14(5)

This regulation poses no problem in regard to the statutory provisions outlined above.

The essence of this regulation is that penalties "be appropriate to the violation". It proceeds to set out and explain the kinds of factors that may be considered in determining appropriateness. The Michigan statutes obviously encompass such considerations.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(6) An amount appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's control (e.g. floods, fires).

(d) Any state administering a program shall provide for public participation in the state enforcement process by providing either:

(1) Authority which allows intervention as of right of any civil or administrative action to obtain remedies specified in paragraph (a)(1), (2), or (3) of this section by any citizen having an interest which is or may be adversely affected; or

(2) Assurance that the state agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in 40 CFR 123.8(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a state enforcement action.

40 CFR 123.92

(a) Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under this subpart;

40 CFR 123.93

No permit shall be issued by the state director in the following circumstances:

(a) When the conditions of the permit do not comply with the requirements of CWA, or regulations and guidelines implementing CWA, including the section 404(b)(1) environmental

"Whenever administrative, licensing or other proceedings, and judicial review thereof are available by law, the agency or the court may permit...any person...to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein."

Environmental Protection Act
Section 5(1)

"...any person...may maintain an action in the circuit court...for declaratory and equitable relief against the state...(or) any person...for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction."

Environmental Protection Act
Section 2(1)

As stated in the introductory analysis of Michigan's broad environmental protection authority, MEPA gives both a substantive standard for environmental protection and standing to any person to enforce it.

Since MEPA is available, pre-settlement notice is not strictly necessary in all cases. If potential intervenors have not become involved in any earlier administrative proceedings (as allowed under MEPA), and if settlement is unsatisfactory - they may still challenge the administrative resolution as having 'the effect of polluting, impairing or destroying', since all administrative decisions must meet this MEPA standard.

40 CFR 123.92 deals with exemptions to the permit requirements. These are discussed and analyzed in Chart I.

This regulation is surely of a procedural tone--it sets out considerations that must be undertaken by a state in ruling on individual permit applications. Such considerations are, incidentally, repeatedly and

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

guidelines (40 CFR Part 230).

(b) When the regional administrator has objected to issuance of the permit under section 404(j) of CWA and the objection has not been resolved.

(c) When, in the judgement of the Secretary of the Army, acting through the Chief of Engineers, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge.

(d) When the proposed discharge would be into a defined area for which specification as a disposal site has been prohibited, restricted, denied, or withdrawn by the administrator under section 404(c) of the CWA, and the discharge would fail to comply with administrator's actions under that authority.

pervasively found in the Michigan statutes, particularly MEPA and the WRC act, mentioned above.

40 CFR 123.94

(a) Publicity and preapplication consultation. The state director shall maintain a program to inform, to the extent possible, potential applicants for permits of the requirements of the state program and of the steps required to obtain permits for activities in state regulated waters. The state director is encouraged to include preapplication consultation as part of this program to assist applicants in understanding the requirements of the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230) and in fulfilling permit application requirements.

This is another procedural requirement that needs no analysis of state authority.

(b) Application for permit. Except when an activity is authorized by a general permit under 40 CFR 123.95 or is exempt from the requirement to obtain a permit under 40 CFR 123.92, any person who proposes to discharge dredged or fill material into state regulated waters shall complete, sign and submit an application to the state director. State application forms are subject to EPA review and approval.

See analysis of 40 CFR 123.7(a)(1) (40 CFR 122.4).

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(c) Content of application. A complete application shall include the following information:

(An exhaustive list of information follows, see regulations for specifics.)

40 CFR 123.95

(a) Coverage. The state director may issue a general permit for similar activities as specified in paragraph (b)(1) of this section within a defined geographic area as specified in paragraph (b)(2) of this section, if he or she determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

(b) Conditions. In addition to 40 CFR 122.7 and 123.97, and the applicable requirements of section 123.98, each general permit shall contain conditions as follows:

(1) Activities. A specific description of the type(s) of activities which are authorized, including limitations for any single operation, to ensure that the requirements of paragraph (a) of this section are satisfied. At a minimum, these limitations shall include:

- (i) The amount and quantity of material that may be discharged;
- (ii) The type(s) of material that may be discharged;
- (iii) The depth of fill permitted;
- (iv) The maximum extent to which an area may be filled; and
- (v) The size and type of structures that may be constructed.

"The department...may issue general permits ...for a category of activities if the department determines that the activities are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment."
Wetland Protection Act
Section 10(1)

"The department...may establish minor project categories of activities and projects that are similar in nature and have minimal adverse environmental impact."
Inland Lakes and Streams Act
Section 6(6)

"The department...may issue general permits on a state or county basis for a category of activities."
Wetland Protection Act
Section 10(1)

"The department...may establish minor project categories of activities and projects that are similar in nature..."
Inland Lakes and Streams Act
Section 6(6)

For the purpose of examining authority, it is sufficient to note that the state may require the information needed; the specifics mentioned are, then, procedural suggestions needing no analysis of Michigan's legal authority.

The cited Michigan provisions speak for themselves in meeting this regulation.

Michigan law provides for the issuance of general permits. The specific suggestions contained in this regulation are but the types of factors that determine whether projects qualify for the general permit in the first place. The simplest and most direct method of assuring compliance with this regulation, though, would be to include its dictates as conditions of the permit, a course of action quite supported--as has been repeatedly seen in the course of this analysis--by existent Michigan legal authority.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(2) Area. A precise description of the geographic area to which the general permit applies, including, when appropriate, limitations on the types of waters or wetlands whose operations may be conducted, to ensure that the requirements of paragraph (a) of this section are satisfied.

(3) Notices. The permit shall contain a requirement that no activity is authorized under the general permit unless the director receives notice at least 30 days in advance of the date when the proposed activity is to commence. The director may require any information in the notice necessary to determine whether the conditions of the general permit will be satisfied. If within 15 days of the date of submission of the notice the owner or operator has not been informed by the state director of his or her intent to require an individual permit application, the owner or operator may commence operations under the general permit.

(c) Requiring an individual permit.

(1) Upon receiving notice under paragraph (b)(3) of this section, the state director may require, at his discretion, that the owner or operator apply for an individual permit. Cases where an individual permit may be required include:

- (i) The activity has more than a minimal adverse environmental effect;
- (ii) The cumulative effects on the environment of the authorized activities are more than minimal; or
- (iii) The discharger is not in compliance with the conditions of the general permit.

(2) When the state director notifies the owner or operator within 15 days of receipt of notice under paragraph (b)(3) of this section that an individual permit application is required for that activity, the activity shall not be authorized by the general permit.

(3) The director may require any person authorized under a general permit to apply for an individual permit.

"A general permit may be revoked or modified if...the department determines that...the activities would be more appropriately authorized by an individual permit."
Wetland Protection Act
Section 11(1)

The procedures outlined by this regulation poses no real problem in terms of state authority. As indicated above, general permits are provided for in Michigan law. Inasmuch as their issuance is at the department's discretion it quite clearly can decline to so issue, thus necessitating an individual permit.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 123.96 Emergency permits.

(a) Coverage. Notwithstanding any other provisions of this part or part 124, the state director may temporarily permit a specific dredge or fill activity if:

(1) An unacceptable hazard to life or severe loss of property will occur if an emergency permit is not granted; and

(2) The anticipated threat or loss may occur before a permit can be issued or modified under the procedures otherwise required by this part and part 124;

(b) Requirements for issuance. (1) The emergency permit shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of 40 CFR 122.7, 123.97 and 123.98.

(2) Any emergency permit shall be limited in duration to the time required to complete the authorized emergency action, not to exceed 90 days.

(3) The emergency permit must have a condition requiring restoration of the disposal site (for example, removal of fill, steps to prevent erosion). If more than 90 days from issuance is necessary to complete restoration, the permit may be extended for this purpose only.

(4) The emergency permit may be oral or written. If oral, it must be followed within five days by a written emergency permit.

(5) Notice of the emergency permit shall be published and public comments received in accordance with applicable requirements of 40 CFR 124.10 and 124.11 as soon as possible but no later than 10 days after the issuance date.

(6) The emergency permit may be terminated at any time without process if the state director determines that termination is appropriate to protect human health or the environment.

"In an emergency, the department may issue a conditional permit."

Inland Lakes and Streams Act
Section 6(5)

Michigan law does make some provision for such an emergency approval, although it would be of no consequence if it did not, since that would merely exemplify a state program that is more stringent than the federal requisites.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 123.97 Additional conditions applicable to all 404 permits.

The following conditions, in addition to those set forth in 40 CFR 122.7, apply to all 404 permits:

(a) The permittee need not comply with the conditions of this permit to the extent and for the duration that such noncompliance is authorized in an emergency permit (see 40 CFR 123.96).

(b) Activities are not conducted under the authority of this permit if they are not specifically identified and authorized in this permit.

(c) The permittee shall maintain the authorized work area in good condition and in accordance with the requirements contained in this permit.

(d) If any applicable water quality standards are revised or modified, or if a toxic effluent standard or prohibition under CWA section 307(a) is established for a pollutant present in the permittee's discharge and is more stringent than any limitation in the permit, the permit shall be promptly modified to conform to the standard, limitation or prohibition.

40 CFR 123.98 Establishing 404 permit conditions.

In addition to the conditions established under 40 CFR 122.8(8), each 404 permit shall include conditions meeting the following requirements, when applicable:

(a) Identification. A specific identification and description of the authorized activity, including:

(1) The name and address of the permittee and the permit application identification number;

(2) The use or purpose of the discharge;

(3) The type and quantity of the materials to be discharged;

(4) Any structures proposed to be erected on fill material; and

Please see analysis of 40 CFR 123.7(a)(3) (40 CFR 122.7) above; these conditions fall within the scope of the conditions discussed therein.

This regulation is of an operational impact; the state certainly has the authority to include such conditions in any individual permit. Thus, this section presents no problem of state authority.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

(5) The location and boundaries of the discharge site(s) including a detailed sketch and a description of affected state regulated waters.

(b) Environmental guidelines. Provisions ensuring that the discharge will be conducted in compliance with the environmental guidelines issued under section 404(b)(1) of CWA (40 CFR Part 230), including conditions to ensure that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.

(c) Water quality standards. Any requirements necessary to comply with water quality standards established under applicable state or federal law. If an applicable water quality standard is promulgated after the permit is issued, it shall be modified as provided in 40 CFR 123.97(d).

(d) Toxic effluent guidelines or prohibitions. Requirements necessary to comply with any applicable toxic effluent standard or prohibition under section 307(a) of CWA or applicable state or local law. If an applicable toxic effluent standard or prohibition is promulgated after the permit is issued, it shall be modified as provided in 40 CFR 123.97(d).

(e) Best management practices. Applicable BMPs approved by a statewide CWA section 208(b)(4) agency as provided in the agreement described in 40 CFR 123.102(a)(1).

(f) General permits. Any conditions necessary for general permits as required under 40 CFR 123.95.

(g) Commencement of work. A specific date on which the permit shall automatically expire, unless previously revoked and re-issued or modified or continued, if the authorized work has not been commenced.

FEDERAL REQUIREMENT

STATE AUTHORITY

DISCUSSION

40 CFR 123.102 Enforcement authority.

In addition to meeting the requirements of 40 CFR 123.9, state section 404 programs shall include procedures which enable the state director to immediately and effectively halt or remove any unauthorized discharges of dredged or fill material, including the authority to issue a cease and desist order, or restoration order to any person responsible for, or involved in, an unauthorized discharge.

"If...the department finds that a person is in violation of this act or a condition set forth in a permit..., the department shall issue an order requiring the person to comply."

Wetland Protection Act
Section 13(1)

"The department may commence a civil action ...to enforce compliance with this act, to restrain violation of this act or any actions contrary to an order of the department denying a permit to enjoin the further performance of, or order the removal of, any project which is undertaken contrary to this act or after denial of a permit by the department or to order the restoration of the affected area to its prior conditions."

Inland Lakes and Streams Act
Section 13(1)

"The court may order a person who violates this act to restore as nearly as possible the wetland which was affected by the violation to its original condition immediately before the violation."

Wetland Protection Act
Section 14(4)

These provisions read in conjunction with the MEPA provisions cited previously, shows the legal authority possessed by the state allowing it to effectively stop any unauthorized discharges.